

TENNESSEE GENERAL ASSEMBLY  
FISCAL REVIEW COMMITTEE



FISCAL MEMORANDUM

SB 95 – HB 84

April 11, 2015

**SUMMARY OF ORIGINAL BILL:** Authorizes the Department of General Services (DGS) and public institutions of higher education to participate in, sponsor, conduct, or administer a cooperative purchasing agreement in accordance with State Building Commission policies and procedures for the procurement of (1) services relating to the transfer, ownership, maintenance, or management of real property; (2) construction, engineering, or architectural services; or (3) construction materials with one or more other state or local governments in accordance with an agreement entered into between the participants. Requires all cooperative purchasing to be awarded through full and open competition. Authorizes public institutions of higher education to participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of goods or services with one or more other states or local governments.

Revises the time in which a protesting party may submit a protest to seven calendar days after the earlier of the notice of the award or intent to award the contract is issued instead of seven calendar days after the claimant knows or should have known of the facts giving rise to the protest. Revises the requirement that the protesting party request a stay to instead specify that a stay of the solicitation, award, or proposed award will be granted upon receipt of a protest of a solicitation, award, or pending award and the accompanying protest bond. Revises the amount of a protest bond and allows the bond to be posted in any of the following amounts: (1) five percent of the lowest bid or cost proposal evaluated; (2) five percent of the maximum liability or estimated maximum liability provided in the solicitation; (3) five percent of the estimated maximum revenue, if the solicitation, award, or proposed award is for a contract in which the state receives revenue; or (4) for no-cost contracts, an amount to be determined by the chief procurement officer (CPO).

Specifies that the protesting party will have an opportunity to oppose payment of the protest bond prior to the bond being payable to the state upon a finding of one of the following: (1) a request for consideration, protest, pleading, motion or other document is signed, before or after appeal to the CPO or protest committee in violation of the provisions regarding certification of such documents; (2) the protest has been brought or pursued in bad faith; (3) the protest does not state on its fact a valid basis for protest; or (4) for any other reason approved by the Protest Committee. Requires that the bond be surrendered if the Protest Committee finds that (1) the affected state agency has suffered damages resulting in a loss of funding, increased expenditures, or a disruption of services; (2) the protest was filed in bad faith or in violation of the provisions regarding certification of protests; and (3) the protest was not upheld.

Authorizes a minority-owned business, woman-owned business, service-disabled veteran-owned business, or Tennessee small business to submit a written petition for an exemption from

the protest bond requirement if the estimated maximum liability, estimated maximum revenue, or lowest evaluated cost proposal for the procurement is less than \$1 million rather than only if the lowest bid or lowest evaluated cost proposal is less than \$1 million.

Authorizes the CPO to authorize the procurement of goods and services with a limitation of a contractor's liability; provided, all respondents to a solicitation had an equal opportunity to request a limitation of liability. Prohibits a contract from limiting the amount of a contractor's liability to the state in an amount less than two times the maximum liability, estimated liability, or maximum revenue of a contract unless specifically authorized by the CPO. Requires a solicitation that includes a limitation of liability amount of less than two times the maximum liability, estimated liability, or maximum revenue of a contract be approved by the Comptroller before the limitation of liability may be included in the contract.

Specifies that a limitation of liability in a state contract will not apply to: (1) liability for intellectual property or to any other liability, including, without limitation, indemnification obligations for infringement of third party intellectual property rights; (2) claims covered by any specific provision in a contract with the state providing for liquidated damages; or (3) claims for intentional torts, criminal acts, fraudulent conduct, or acts or omissions that result in personal injuries or death.

Authorizes the Procurement Commission to promulgate necessary rules to implement the proposed legislation.

**FISCAL IMPACT OF ORIGINAL BILL:**

NOT SIGNIFICANT

**SUMMARY OF AMENDMENT (006155):** Deletes Section 1 of the original bill which authorizes the Department of General Services (DGS) and public institutions of higher education to participate in, sponsor, conduct, or administer a cooperative purchasing agreement in accordance with State Building Commission policies and procedures for the procurement of (1) services relating to the transfer, ownership, maintenance, or management of real property; (2) construction, engineering, or architectural services; or (3) construction materials with one or more other state or local governments in accordance with an agreement entered into between the participants. Section 1 also requires all cooperative purchasing to be awarded through full and open competition. Replaces references to "Tennessee small business" with "small business" in Section 3.

**FISCAL IMPACT OF BILL WITH PROPOSED AMENDMENT:**

NOT SIGNIFICANT

Assumptions for the bill as amended:

- The CPO currently utilizes statewide cooperative agreements that are competitively procured. These agreements leverage the purchasing volume of Tennessee, other states, and local governments to realize cost savings.
- According to the Tennessee Higher Education Commission (THEC), the ability to participate in cooperative purchasing agreements already exists. This would codify current practice.
- According to the DGS, extending the authorization to use cooperative agreements to the area of real estate management has the potential of avoiding costs.
- The various changes to the protest process for aggrieved respondents challenging a solicitation, award, or proposed award of a contract will not significantly affect the workload of the CPO's office.
- The Procurement Commission will not require additional resources to promulgate the necessary rules to implement the required changes.
- Any increase in workloads as a result of the proposed legislation can be accommodated within existing resources without an increased appropriation or reduced reversion.

**CERTIFICATION:**

The information contained herein is true and correct to the best of my knowledge.



Jeffrey L. Spalding, Executive Director

/kml